

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
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)	
Locus Telecommunications, LLC)	Docket No. 06-122
Petition for Declaratory Rulings Relative to)	
The Treatment of Private Carriage Revenues))	

Petition for Declaratory Rulings Relative to the Treatment of Private Carriage Revenues

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I. Introduction and Executive Summary

Pursuant to Section 1.2 of the Federal Communications Commission's ("FCC" or "Commission") rules, Locus Telecommunications, LLC ("Locus" or "the Company"), through undersigned counsel, seeks declaratory rulings to clarify carriers' rights relative to the treatment of private carriage revenues under federal law. Specifically, Locus seeks declaratory rulings that:

- (1) Carriers have the legal right to ensure that revenues derived from private carriage offerings are exempted from non-Universal Service Fund ("USF"), Title II fees (including Telecommunications Relay Services ("TRS") fund, Local Number Portability ("LNP") and North American Numbering Plan ("NANPA") administration fees, collectively referred to herein as "Title II Program Fees"), consistent with FCC rules and judicial precedent interpreting the common/private carrier dichotomy¹ embodied in the Communications Act;
- (2) The Universal Service Administrative Company's ("USAC") policy of sharing FCC Form 499-A (hereafter "Form" or "Form 499-A") revenue data with the administrators of the Title II Programs (collectively "Title II Program Administrators")(based exclusively on the primary service category identified in Line 105 of the Form) is unlawful, and USAC must respect a filer's certified exclusion of private carriage revenues from its Title II Program contribution base via Line 603 of the Form; and
- (3) Carriers must be afforded an opportunity for redress both retroactively (for historic Title II Program fees calculated and invoiced based on private carriage revenues and unwittingly paid by carriers to the respective Title II Programs) and prospectively.

¹ See, e.g., Pitsch, Peter K. and Bresnahan, Arthur W. (1996) "Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative," *Federal Communications Law Journal*: Vol. 48: Iss. 3, Article 4. Available at: <http://www.repository.law.indiana.edu/fclj/vol48/iss3/4>

Locus seeks a declaration that the law affords carriers the right to exclude private carriage revenues from Title II Program contributions. The Communications Act, coupled with decades of judicial precedent, reflects a dichotomy between the treatment of private and common carriage offerings. USAC, however, has failed to properly apply and honor federal laws and FCC regulations governing the distinct treatment of private and common carrier services. Importantly, although Title II Program Fees do not apply to private carriage revenues, USAC has steadfastly refused to recognize carriers' rights to exclude such revenues from Title II Program contributions. To guarantee carriers future opportunities to avoid paying Title II Program Fees on exempt private carriage revenues, the FCC must declare that, without question, carriers have clear legal rights to exclude private carriage revenues from Title II Program Fee contributions through existing mechanisms available in the Form 499-A, as hereinafter explained.

Moreover, the Commission must intervene to curb USAC's role in prohibiting carriers from exercising this right. USAC is perpetuating an unlawful, unauthorized policy which prevents carriers from excluding lawfully exempted revenues from Title II Program Fees. USAC claims it is powerless to modify its policies, and suggested that Locus seek relief from the Commission. Accordingly, Locus respectfully requests FCC intervention to: (A) prevent USAC from continuing to share private carrier revenue with the Title II Program Administrators; (B) ensure aggrieved carriers are refunded all Title II Program Fees erroneously remitted as a consequence of USAC's policies (for so long as USAC's policies have been in effect); and (C) order USAC to permit carriers to use Line 603 to exclude private carrier revenue from the Title II Program Fee contribution base.

II. Background

In calendar year 2015, Locus sold prepaid calling cards, prepaid wireless/mobile services and voice termination services in addition to certain non-telecommunications offerings (such as wireless handsets and international top-up). Locus offered some of its services on a private carriage basis (namely its prepaid calling cards and voice termination services) and others (prepaid wireless) on a common carriage basis. Earlier this year, Locus timely filed its 2016 Form 499-A reporting 2015 revenues from each of its offerings. In Line 105 of the Form, Locus identified service categories based upon total revenues earned by category. Accordingly, Locus listed Cellular/PCS/SMR (prepaid wireless), a common carriage service, as its primary service offering (#1) in Line 105. Locus listed “Private Service Provider” as its second highest revenue driver (#2), Prepaid Card third (#3), and Toll Reseller services fourth (#4).

The 2016 Form does not include a clear and unambiguous method to allow carriers, like Locus, to segregate revenues derived from services offered on a private carriage basis from those derived from common carriage offerings. As further discussed below, this flaw is problematic because, while revenues derived from common carriage are subject to Title II Program Fees, revenues from services provided on a private carriage basis are exempt from such fees. USAC, which administers the USF, shares data reported on the Form 499-A with the Title II Program Administrators to enable them to invoice contributors to those funding mechanisms. In an attempt to segregate and exclude its private carriage revenues from the revenue data shared by USAC with the Title II Program Administrators, Locus indicated its (partial) exemption from contribution to the NANPA, TRS and LNP funding mechanisms by checking the appropriate boxes in Line 603.² Locus included the following explanation:

² In prior year filings, Locus had attempted to exclude private carriage revenues from its Title II Fund contribution base by identifying them in Line 513.

Locus is a private carrier with respect to all revenues reported on Lines 411, 412 and 414.1 [...] Locus is therefore exempt from contributing to TRS, LNP Administration, and NANPA based on these private carriage revenues. Locus is a common carrier with respect to its remaining telecommunications revenues and is not exempt from contributing to TRS, LNP Administration and NANPA based on its common carrier revenues.

Along with its 2016 Form, Locus filed a supplement explaining its rationale for including the above language and the legal support for segregating private from common carrier revenue. USAC declined to recognize the private carrier exemption and shared 100% of the total interstate and international private and common carrier revenue data reported on the Form with the Title II Program Administrators.

In late July, Locus received invoices from Rolka Loube (TRS Fund administrator) and Neustar (administrator of the LNP funding mechanism) for TRS and LNP fees respectively. The July TRS invoice calculates Locus's TRS liability based on the entire amount reported in Line 512(b) of the 2016 Form 499-A. The July LNP invoice likewise appears to calculate Locus's LNP liability based on the entire amount reported in Line 423 of the 2016 Form 499-A.

On August 26th, Locus appealed the July invoices to the respective administrators, copying USAC. Locus argued that Rolka Loube and Neustar had incorrectly calculated Locus's TRS and LNP liability. Locus asserted that its TRS and LNP assessments should have been based exclusively on its common carriage revenues reported on the Form 499-A.

On September 9th, Locus's counsel had a discussion with Neustar's counsel, who suggested that Neustar could only process the data it received from USAC and had no authority to make a decision on the appeal before it. On September 22nd, in discussions with USAC, USAC's General Counsel stated that USAC's hands are tied, and suggested that Locus either: (1) go back to the Title II Program Administrators; or (2) pursue the issue with the Commission. USAC's General Counsel also stated:

- USAC cannot adjust the Form.
- Form 499-A does not provide filers with a mechanism to segregate private from common carriage revenues.
- USAC shares data with the Title II Program Administrators based upon the primary (#1) service type identified in Line 105.
- USAC suggested that it is the Title II Program Administrators' responsibility to take the data they receive and to bill according to applicable rules, and that USAC could provide no relief on the pending appeals.

On September 28th, Rolka Loube advised that it would “contact USAC for additional information” on the appeal of the TRS invoice pending before it. On October 4th, Rolka Loube confirmed that it would not be issuing a further decision on the appeal and directed Locus to USAC, noting, “We are bound by the information we receive from USAC, please contact them directly.” On September 30th, Locus’s counsel received written confirmation from Neustar of its position on the appeal. In an attempt to secure guidance from the Commission on how to resolve this issue- both the pending invoice appeals and the broader issue, i.e., how carriers can legally segregate private and common carriage revenues on Form 499-A going forward, Locus and its counsel met with FCC staff on October 27, 2016. Following that discussion, Locus submitted a request for review to the Commission of Rolka Loube and Neustar’s decisions (or rather, failure to take action on) the appeals of the July invoices, or in the alternative, the July and all subsequent invoices based upon revenue reported on Locus’s 2016 Form 499-A. That appeal remains pending. Concurrent with that filing, Locus requests the declaratory rulings outlined herein relative to the treatment of private carriage revenues under federal law as detailed herein.

III. Argument

A. The Communications Act and Judicial Precedent Reflect a Well-recognized Dichotomy Between Private and Common Carriage Service Offerings

The FCC has long recognized the distinct regulatory treatment of “private carriage” and “common carriage.” Title II of the Communications Act of 1934 details obligations applicable to “common carriers” including, for example, offering services upon reasonable request, charging just and reasonable rates, and avoiding unreasonable price or service discrimination, among others.³ The 1934 Act simply defined a “common carrier” as “any person engaged as a common carrier for hire.”⁴ A series of judicial decisions over the next several decades evaluated and clarified the definition of “common carriage.” In 1976, the D.C. Circuit ultimately held that common carriers are entities that “hold themselves out” as providing communications services to the general public.⁵ During the same period, the D.C. Circuit interpreted the distinct regulatory frameworks for basic “communications services” and “enhanced services.”⁶ Thereafter, the Communications Act of 1996 preserved both the common/private carrier dichotomy in the 1934 Act and confirmed the exclusion of “information” or “enhanced” services from the Commission’s regulatory foothold. The 1996 Act, therefore, defined three service categories, with differing regulatory treatment applicable to each. Specifically, the 1996 Act defines the following service categories:

- *Information Service* - “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . .”⁷

³ 47 U.S.C. § 201(a)-(b).

⁴ 47 U.S.C. § 153(10).

⁵ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976) (“*NARUC I*”).

⁶ *See In re Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Final Decision, 77 F.C.C. 2d 384 (“*Computer II Final Decision*”), *modified by* Memorandum Opinion and Order, 84 F.C.C. 2d 50 (1980), *aff’d and clarified by* Memorandum Opinion and Order on Further Consideration, 88 F.C.C. 2d 512 (1981), *aff’d sub nom. Computer & Comm. Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

⁷ 47 U.S.C. § 153(20).

- *Telecommunications* - “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁸
- *Telecommunications Service* - “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁹

Information/enhanced services are largely unregulated; revenues from such offerings are not subject to USF contribution obligations.¹⁰ An information service classification generally exempts both the service and the service provider from direct regulation by the FCC or the states.¹¹ “Telecommunications” offerings are subject to some regulatory oversight. Providers that merely offer “telecommunications” (not “telecommunications services”) are considered private carriers. Private carriers offer services to select customers based upon individually negotiated terms.¹² Private carriers must comply with a limited subset of FCC regulations, specifically extended to them by the Commission through its ancillary authority.

Importantly, for purposes of this Petition, private carriers must contribute to the USF and make FCC regulatory fee payments, but are exempt from contributing to the Title II Programs. In addition, private carriers also face much less regulatory oversight than common carriers at the state level. Common carriers, however, must comply with the panoply of federal regulations pursuant to Title II of the 1996 Act.

⁸ 47 U.S.C. § 153(43).

⁹ 47 U.S.C. § 153(46).

¹⁰ See *Amendment of Section 64.702 of the Commission’s Rules and Regs.*, 77 FCC 2d 384 (1980); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1932, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 (1996) (“*Non-Accounting Safeguards Order*”); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501 (1998) (“*Stevens Report*”).

¹¹ See *Stevens Report*.

¹² The key distinction between common carriers and private carriers is that common carriers “serve all potential customers indifferently,” whereas private carriers “make individualized decisions...whether and on what terms to deal.” *NARUC I*, 525 F.2d at 644, n.76.

As further discussed below, the courts and the Commission have recognized that a single service provider may offer services from one or more of the three categories defined in the 1996 Act. Specifically, a single provider may offer some services on a private carriage basis and others as a common carrier. In 1990, in its IXC Competition NPRM, the FCC proposed to permit AT&T (and other long-distance carriers) to offer contract services on a private carriage basis.¹³ Through such “contract tariffs,” consumers could choose to engage with AT&T (and others) through individually negotiated agreements, i.e., on a private carriage basis, or accept generally applicable terms (common carriage).¹⁴ Despite de-tarffing in 2000, the FCC left undisturbed the three service categories in the 1996 Act, reflecting the private/common carriage dichotomy.¹⁵ This regulatory regime remains in place today, where countless carriers offer different services through a variety of arrangements – on both a private and common carriage basis.

Perhaps the simplest example of modern-day private carriage arrangements are “wholesale” agreements between carriers. Some carriers sell excess capacity, or negotiate traffic exchange agreements with other carriers. These providers negotiate individual terms and do not “hold themselves out” to offer services on standard terms to the general public, i.e., the very definition of private carriage. Such arrangements face far less regulatory oversight under applicable law than the type of common carrier arrangements contemplated by Congress when it enacted the 1934 Act.

¹³ IXC Competition NPRM, 5 FCC Rcd. 2644, para. 142 (1990).

¹⁴ *Id.* at 2657, n.186.

¹⁵ Computer II FCC Final Decision, 77 F.C.C.2d, paras. 168-179.

B. Carriers Can Offer Services on Both a Private and Common Carriage Basis; Only Private Carriage Revenues are Subject to Title II Program Fees

Congress, the FCC, and the courts have long recognized that carriers may operate as private service providers with respect to some services and common carriers with respect to others.¹⁶ The law does NOT require service providers to structurally separate in order to take advantage of the lower regulatory burdens imposed on private carrier services. Yet, that is precisely what USAC's current policies would require a service provider, like Locus, to do in order to avoid the imposition of Title II Program Fees on revenue derived from private carrier services.

The Communications Act provides that a “telecommunications carrier shall be treated as a common carrier under [Title II] *only to the extent that it is engaged in providing telecommunications services.*”¹⁷ Accordingly, the FCC “must examine the actual conduct of an entity to determine if it is a common carrier” for the specific purposes at issue rather than relying merely on its status as a common carrier for some purposes.¹⁸ As the D.C. Circuit has explained, “the mere fact that petitioners are common carriers with respect to some forms of telecommunication does not relieve the Commission from supporting its conclusion that petitioners provide [each service at issue] on a common carrier basis.”¹⁹ In sum, the Communications Act, the FCC's regulations, and decades of judicial precedent recognize that a single entity (*i.e.*, one service provider, one Form 499 filer, one contributor) can act as both a

¹⁶ *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (“*NARUC II*”) (“[I]t is at least logical to conclude that one can be a common carrier with regard to some activities but not others.”); *In re Audio Comm'cns, Inc.*, 8 FCC Rcd. 8697, 8698-99 (1993) (“[A] single firm that is a common carrier in some roles need not be a common carrier in other roles.”).

¹⁷ 47 U.S.C. § 153(51) (emphasis added).

¹⁸ *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 60 (2d Cir. 2006); *see also Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12 (1927) (explaining that “[a] common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests”).

¹⁹ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *see also Eagleview Technologies, Inc. v. MDS Associates*, 190 F.3d 1195, 1198 (11th Cir. 1999).

common and a private carrier; and, by virtue of these distinct operations, a single entity may derive revenue that is subject to different regulatory schemes and associated costs (i.e., support fees and contributions).

Common carriage revenues are subject to both USF contributions and Title II Program Fees. Private carriage revenues, on the other hand, are subject to USF fees only, and are exempt from all other Title II Program Fees. By law, a single entity that derives revenue from both common and private carrier services should only be subject to the contributions and fees applicable to the revenues from each, distinct type of offering. It is unlawful and capricious to subject private carrier revenue to Title II Program Fees merely because the revenue is derived by a provider selling both common and private carrier services. As currently administered by USAC, the 2016 Form 499-A (indeed, all Forms 499-A since the consolidated worksheet was adopted in 2002) forces carriers, like Locus, to pay Title II Program Fees on private carrier revenue, as further explained herein.

C. The FCC Must Declare that Carriers Have the Legal Right to Ensure that Revenues Derived from Private Carriage Offerings are Exempt from Title II Fees

The private/common carriage dichotomy founded in federal law and decades of judicial precedent has been eroded in recent years. Whereas, initially, the Commission respected the dual regulatory schemes applicable to private and common carriage offerings, it has permitted USAC, through its unlawful policies, to deny carriers the right to exempt private carriage revenues from Title II Program Fees. In order to restore the dual regulatory regimes embodied in the Communications Act and FCC rules for private and common carriage, the Commission must declare that carriers have the legal right to ensure that revenues derived from private carriage offerings remain exempt from Title II Program Fees.

D. As Applied by USAC, the Form 499-A is Deficient and Fails to Provide Carriers with a Means to Segregate Common from Private Carriage Revenues

USAC fails to provide service providers, like Locus, with the opportunity to identify and segregate private from common carrier revenue anywhere in the Form 499-A itself or through the submission of supplemental information via Line 603. As such, USAC does not provide Locus with the ability to exclude private carrier revenue from being shared with the Title II Program Administrators. USAC's administration of the Form, therefore, does not comply with the Communications Act and FCC precedent, which specify that private carriage revenues are exempt from Title II Program Fees – instead, USAC's policies force carriers, like Locus, to be subjected to these fees lest they engage in some form of self-help that is detrimental to other programs (for example, by seeking to exclude private carrier revenue from *both* the USF and Title II Program contribution bases by claiming Private Service Provider as their #1 service category in Line 105).

E. USAC Wrongfully Rejected Locus's Supplemental Information and Incorrectly Shared Revenue Data with the Title II Program Administrators; USAC's Policy for Sharing Revenue Data Must be Overturned

Locus sought to exclude its private carriage revenue from its Title II Program Fee contribution base through a disclosure statement in Line 603 of the Form and a supplement to its 2016 Form 499-A. USAC, however, ignored the language in Line 603 and the supplemental filing. USAC claimed that it determined whether to share information reported with the Title II Program Administrators based exclusively on the primary service identified in Line 105 of the Form (i.e., the service listed (#1) by the filer). Because Locus listed Cellular/PCS/SMR first (#1) in Line 105, and Private Service Provider second (#2), USAC shared revenue data with the Title II Program Administrators. Upon processing the aggregate revenue data provided by USAC, the Administrators billed Locus Title II Program Fees on private carrier revenue, in violation of the law.

USAC should not have ignored the supplement and language submitted in Line 603 of Locus's Form identifying private carriage revenues. USAC's policy is unlawful because it administratively denies Locus (and similarly situated filers) its legal right to exclude private carrier revenue from the Title II Program Fee base, which is necessary to avoid being invoiced by the Title II Program Administrators on said private carriage revenue. Pursuant to FCC rules, contributors must have the opportunity to exclude *all* private carriage revenue from Title II Program Fee contributions. Denying a carrier the ability to exclude private carriage revenue from its Title II Program Fee base simply because it derived more revenue from common carriage than private carriage offerings clearly violates Commission rules.²⁰ USAC should withhold *any* private carriage revenues self-identified by the certifying contributor, regardless of whether the filer listed "Private Service Provider" as its primary service category in Line 105 of the Form. Accordingly, the Commission must declare USAC's policy to be unlawful and direct USAC to rescind this policy, and to withhold Locus's (and similarly situated carriers') certified private carriage revenues, as identified in Line 603 of the Form, from the data shared with the Title II Program Administrators. Anything less would be arbitrary and capricious and a violation of statute and judicial precedent.

F. Carriers Must be Afforded an Opportunity for Redress both Retroactively and Prospectively

Locus was surprised to learn when it met with Commission staff in late October that no other carrier has raised the issue of USAC's unlawful policy of sharing revenue data with the Title II Program Administrators based exclusively on the primary service identified in Line 105 of the Form or the complications with segregating private from common carriage revenues for reporting

²⁰ Likewise, one can presume that filers whose private service provider revenue is the primary source of revenue, but not their only source of revenue, and who identify themselves as #1 Private Service Provider in Line 105, are likely to be under-contributing to the Title II Programs.

purposes. Nonetheless, Locus is undoubtedly not alone in this struggle as countless carriers have likely overpaid Title II Program Fees on private carriage revenue that should be exempt. These carriers must be afforded the opportunity to seek redress for historic overpayments. Moreover, the Commission must establish a process through which carriers can lodge future grievances related to inflated Title II Program Fee invoices and overpayments of Title II Program Fees. Absent such a process, carriers would be denied due process afforded to them by federal law.²¹

IV. Conclusion

For the foregoing reasons, Locus respectfully requests that the Commission declare that:

1. Carriers have the legal right to ensure that revenues derived from private carriage offerings are exempted from Title II Program Fees;
2. USAC's policy of sharing Form 499-A data with the Title II Program Administrators (based exclusively on the primary service disclosed on the Form) is unlawful, and USAC must respect a filer's certified exclusion of private carriage revenues from its Title II Program contribution base via Line 603 of the Form; and
3. Carriers must be afforded an opportunity for redress both retroactively (for historic Title II Program Fees erroneously paid on private carriage revenues) and prospectively.

²¹ 42 U.S.C. § 1983.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JSM', with a long horizontal flourish extending to the right.

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